

South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies

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Introduction

South Africa is blessed with a wealth of land and natural resources.¹

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1. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 available at <http://www.saflii.org/za/cases/ZACC/2013/9.html> ("South Africa is 48 CORNELL INT'L L.J. 219 (2015)

However, as a result of South Africa's previous apartheid government, approximately 13% of the population controls 87% of the country's land and minerals.² Despite this present-day inequality, the rise of democracy in 1994 engendered a new South Africa.³ This rebirth led to the creation of a new constitution aimed at rectifying South Africa's history of land-grabbing and race-based politics through the redistribution of the country's land to its rightful owners.⁴

The new South African Constitution specifically promotes "an open and democratic society" with the economic goals of "improv[ing] the quality of life of each person and free[ing] the potential of each person."⁵ The South African Constitutional Committee determined that improving each individual's quality of life was directly tied to providing equal access to land, natural resources, land reform, and adequate housing.⁶ Therefore those rights, among others, are expressly granted in the South African Constitution.⁷

Nevertheless, tension arises from the realities of land ownership in post-apartheid South Africa.⁸ Economic power from land ownership is

not only a beauty to behold but also a geographically sizeable country and very rich in minerals").

2. The Land and Agrarian Reform Project (LARP), The Concept Document 6 (Feb. 2008) available at http://www.nda.agric.za/doaDev/topMenu/DoAProgrammes/LARP_25Feb08.pdf [hereinafter LARP] (identifying land distribution as a priority in light of "the new democratic Government of South Africa inherit[ing] a racially highly skewed land distribution: whites owned 87 and blacks 13 percent of agricultural land."). See also *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 ("the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population"); Edward Lahiff, *Documentaries with a point of view: Promised Land, Q&A: Land Reform in South Africa*, PBS (July 6, 2010) available at http://www.pbs.org/pov/promisedland/land_reform.php ("In 1994, at the end of apartheid, almost 90 percent of the land in South Africa was owned by white South Africans, who make up less than 10 percent of the population. . . . [l]ess than 7 percent of land has been redistributed to date").

3. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 2 para. 1 ("To address th[ese] gross economic inequality[ies], legislative measures were taken to facilitate equitable access to opportunities in the mining industry").

4. See Bernadette Atuahene, *South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid*, FOREIGN AFFAIRS (July/Aug. 2011) available at <http://www.foreignaffairs.com/articles/67905/bernadette-atuahene/south-africas-land-reform-crisis> (identifying the African National Congress's (ANC) goal of "redistributing 30 percent of the land from whites to blacks in the first five years of the new democracy" after Mandela took power in 1994).

5. S. AFR. CONST., Preamble (1996).

6. See S. AFR. CONST. (1996), §§ 25, 26, 27, 29.

7. See *id.* The constitution provides additional rights including, access to health care, sufficient food and water, social security, and education.

8. See Palash Ghosh, *South Africa's White Farmers: An Endangered Species?*, INTERNATIONAL BUSINESS TIMES (Dec. 3, 2012, 1:06 PM) available at <http://www.ibtimes.com/south-africas-white-farmers-endangered-species-915345> (discussing the hundreds of murders and attacks on white South African farmers and the lack of response their farming associations are likely to receive from the government); see also Frans Cronje, *How much of SA's land is really in black hands?*, POLITICS WEB (Feb. 27, 2012) available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619/page71639>

divided almost cleanly along racial lines, creating racial tension between black and white South Africans due to the economic inequalities. These economic inequalities derive from the apartheid government's systematic transfer of land from black South Africans to white South Africans over the course of a century.⁹ Today, despite innovative land reform programs, the current government has had limited success returning or redistributing land.¹⁰ As a result, land ownership continues to be an emotional and highly charged issue with whites maintaining ownership over the vast majority of the country's land. Professor Atuahene cites James Gibson's survey of South African public opinion and argues,

South Africa's failure to rectify its land inequality is like a sea of oil waiting for a match. In one of the most impressive public opinion studies ever conducted in the country, in 2009 the political scientist James Gibson surveyed 3,700 South Africans and found that 85 percent of black respondents believed that 'most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today.' Only eight percent of white respondents held the same view. Gibson's most alarming finding was that two of every three of these blacks agreed that 'land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country'; 91 percent of the whites surveyed disagreed.¹¹

While the land-restitution programs initially experienced success, the government's progress has plateaued.¹² Scholars and critics have predicted that if the situation is not improved, South Africa might end up in a violent revolt similar to the one experienced in neighboring Zimbabwe.¹³

?oid=282525&sn=Detail&pid=71639 ("Any discussion on land ownership in South Africa risks generating more heat than light").

9. See THE CENTRE FOR DEVELOPMENT AND ENTERPRISE, POLICY IN THE MAKING: LAND REFORM IN SOUTH AFRICA: A 21ST CENTURY PERSPECTIVE 5-7 (June 2005). During the apartheid era, the Native Land Act of 1913, the 1936 Natives Trust and Land Act, and the Group Areas Act of 1950 continued to transfer land ownership from black to white South Africans. Today, whites own over 80% of the land in South Africa, with the majority of the remaining 20% set aside by the government for tribal homelands.

10. See Atuahene, *supra* note 4. Only 8% of South African land has been redistributed since the fall of apartheid, despite extensive government initiatives designed to accomplish that objective.

11. See Atuahene, *supra* note 4.

12. See *id.* The land restitution process experienced more success in urban settings, where victims could be paid damages with money rather than land, than rural settings. See also LARP, *supra* note 2 (identifying the previous land reform policies as slow and of questionable success, in the context of a government document).

13. See Alanna Chang, *South Africa: The Up Down, An Application of A Downstream Model to Enforce Positive Socio-Economic Rights*, 21 EMORY INT'L L. REV. 621, 637 (2007) ("In Grootboom, the Constitutional Court prefaced its decision by alluding to South Africa's potential for a Zimbabwe-like land grab"). See e.g. Pumza Fihlani, *Can South Africa avoid doing a Zimbabwe on land?*, BBC NEWS (June 24, 2013, 11:25) available at <http://www.bbc.com/news/world-africa-22967906> ("In the face of the lack of progress, some activists are calling for a more drastic approach, including taking land from white farmers without compensation . . . But many look at Zimbabwe's economic meltdown after it seized most of the country's white-owned commercial farms and caution against this approach"); Robin Palmer, Land Policy Adviser, *The World Bank, Civil Society, and Land Reform*, OXFAM GB (Aug. 2000) available at www.mokoro.co.uk/files/13/file/Lria/

The apartheid regime caused similar tensions in South Africa's mining industry, through policies that resulted in race-based dispossession of mineral rights.¹⁴ While transferring land rights, white colonists simultaneously took ownership over the country's mineral rights through legislation designed to create colonial wealth.¹⁵ Until the 1990s, whites maintained almost complete title to the country's mineral and mining rights with minimal limits on the way those rights could be exercised.¹⁶ Through post-apartheid government regulation and industry-wide reforms, the past twenty years have seen the mining industry evolve in positive ways. The main change has come from partial nationalization of the mining industry and a revocation of the colonial mining legislation. This has enabled the government to implement a system that meets the goals of efficiency, mineral conservation, and equal access to mineral resources.¹⁷

South Africa's successful reform of the mineral ownership program serves as a model to other African countries that are struggling with foreign possession of domestic resources.¹⁸ Given Africa's history of colonization, many countries currently find themselves struggling with foreign

wb_civil_society_land_reform.pdf ("As for the "new" and much-hyped model of "market-assisted" land reforms, which involve governments taking a more hands-off approach, they have conspicuously failed to address either political realities or power relations on the ground. In Brazil they have done nothing to break the power of the large landlords, while in post-apartheid South Africa their scope for securing sustainable rural livelihoods for poor people has proved to be extremely limited").

14. See Laissez-Fair, *Mining in South Africa and Private Enterprise*, 3 S. AFR. J. ON HUM. RTS. 167, 172 (1987). Franz Wild and Mike Cohen, *Mandela's Wealth-Sharing Dream Fades in South Africa*, BLOOMBERG (July 23, 2013) available at <http://www.bloomberg.com/news/print/2013-07-22/mandela-s-wealth-sharing-dream-fades-in-south-africa.html> (explaining a conflict between villagers in Modikwa and African Rainbow Minerals Ltd. (ARI) mining company over the Modikwa platinum mine in Limpopo province. The founders of the mine promised to develop schools, hospitals, and homes, in return for a lucrative mining operation. Today 80,000 villagers have seen no benefit from the mine while ARI remains highly lucrative).

15. See F.T. Cawood and R.C.A. Minnitt, *A historical perspective on the economics of the ownership of mineral rights ownership*, THE JOURNAL OF THE SOUTH AFRICAN INSTITUTE OF MINING AND METALLURGY 369, 370 (1998) (referring to the Native Land Act 27 of 1913). Today whites occupy 73% of the top business management positions. See COMMISSION FOR EMPLOYMENT EQUITY ANNUAL REPORT 2012-13, DEPARTMENT OF LABOUR OF THE REPUBLIC OF SOUTH AFRICA (Apr. 2013) available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/commission-for-employment-equity-annual-report-2012-2013/cee13report.pdf/view>.

16. See DEPARTMENT OF MINERALS AND ENERGY, *A MINERALS AND MINING POLICY FOR SOUTH AFRICA*, 1.3.1.2 Ownership of Mineral Rights (Oct. 1998) available at http://www.polity.org.za/polity/govdocs/white_papers/minerals98.html (explaining that South Africa's mineral rights used to be 1/3 state-owned and 2/3s privately owned, while "[a] distinguishing feature of the South African mining industry at present is that almost all privately-owned mineral rights are in white hands").

17. See ANC POLICY INSTITUTE, *MAXIMIZING THE DEVELOPMENTAL IMPACT OF THE PEOPLE'S MINERAL ASSETS: STATE INTERVENTION IN THE MINERALS SECTOR 1, 2* (Feb. 2012) available at www.anc.org.za/docs/reps/2012/simsreport.pdf (discussing the nationalization of South Africa's mines as a pathway toward "effectively maximis[ing] the growth, development and employment potential embedded in such national [mineral] assets, and not purely for profit maximization").

18. See Cawood & Minnitt, *supra* note 15, at 370.

control of their oil and mineral wealth.¹⁹ In the past twenty years, South Africa and a few other African countries²⁰ have corrected this inequality by implementing land and mineral licensing programs.²¹ These programs have allowed mining companies to continue business operations while giving the African governments control over the quantity of minerals extracted, the duration of mining licenses, the parties participating in mining processes, and the benefits local communities receive from the operations.²²

The purpose of this Note is to propose a method for South Africa to mirror its domestic mineral reform success in its land reform programs. South Africa is opportunely situated to accomplish this objective because it has the most liberal constitution in the world.²³ This constitution creates a legal framework for progressive land and resource redistribution.²⁴ If South Africa creates a successful land distribution scheme, this system could serve as an example for numerous other African countries experiencing similar struggles. Even in the absence of a rights-based constitution, other African countries could adapt South Africa's model of progressive taxation as a solution to land reform.

Part I of this Note introduces background on the issue and examines South Africa's history and present legal framework, which has paved the way for progressive land reform. Part II analyzes the success and future potential of South Africa's current land restitution policies. Part III examines the history of South Africa's mining policies, describes how the current progressive taxation system successfully accomplishes the country's mining goals, and addresses the interests of all parties involved. Part IV describes how South Africa can utilize its mining regulatory framework to meet its land distribution goals. This Note concludes that the advances South Africa has made in its mining policy can successfully be applied to its land distribution program. The improved land distribution program

19. See S. Afr. Trade and Indus. Minister Rob Davies, *New Approach Needed on Investment Treaties*, Presentation at United Nations Conference on Trade and Development, Geneva, (Sept. 24, 2012) available at <http://www.igd.org.za/archives/latest-stories/1597-south-african-minister-new-approach-needed-on-investment-treaties> (recognizing "that while [foreign direct investment] can make a positive contribution to sustainable development, the benefits to host countries are not automatic.").

20. See ANC POLICY INSTITUTE, *supra* note 17, at 2.

21. *Seedid*; see also Mike Cohen, *South Africa Wants Black Ownership of Mines Maintained at 26%*, BLOOMBERG (July 15, 2014, 12:16 PM) available at <http://www.bloomberg.com/news/2014-07-15/south-africa-wants-black-ownership-of-mines-maintained-at-26-.html> (citing comments of South Africa's Mineral Resources Minister Ngoako Ramatlhodi stating that "mining companies should maintain 26 percent black ownership of their assets in the country or risk losing their operating licenses").

22. See *Towards the transfer of Mineral wealth to the ownership of the people as a whole: A Perspective on Nationalisation of Mines*, ANC YOUTH LEAGUE (Aug. 2010) available at <http://www.ancyl.org.za/show.php?id=5502> (discussing the foreseeable benefits of South Africa's mineral nationalization policy); see also David van Wyk, *Debate on Nationalising the Mines in South Africa*, IN DEFENCE OF MARXISM (Feb. 6, 2010) available at <http://www.marxist.com/south-africa-mines-nationalisation-debate.htm>.

23. See *Agri South Africa v Minister for Minerals and Energy*, 1 (4) SA 1 (CC) (2013).

24. See *id.*

will not only provide an efficient, market-driven redistribution of property but will also set a model for other African countries to follow.²⁵

I. Background

A. South Africa's History and Present Legal Framework

1. *Statutory Framework from Colonialism and Apartheid*

The African continent has an extensive history of colonization. During the colonial period, invading countries often stripped native Africans of land and maintained ownership of this land by force.²⁶ South Africa, however, is a poignant example because its history of "property dispossession has greatly contributed to present-day inequality and has become a politically explosive issue that can cause backlash."²⁷

Pre-colonial South Africans utilized collective systems of land rights, which prioritized communal land uses and community interests.²⁸ Individuals, who pledged allegiance to the community, were allowed to maintain individual land allotments to foster land that they inhabited or cultivated.²⁹ Those individual allotments, based on usage, were inheritable in perpetuity.³⁰ The head of the family regulated land usage, and tribal chiefs consulted both elders and those individuals living and using the land before making any decisions that could affect property rights.³¹ Under this communal system, land was distributed based on need, land use, and individual status.³²

The arrival of Dutch colonists in 1652 marked the formation of a new land ownership system.³³ The new system required formal registration of property, did not acknowledge communal land systems, and effectively excluded blacks from property ownership.³⁴ This trend of land dispossession (outside of those blacks who were "grandfathered" into ownership) continued until The Native Land Act of 1913 (the "Native Land Act"). The Native Land Act officially deprived black South Africans of the ability to

25. See Section IV.C *infra*.

26. See Bernadette Atuahene, *Property Rights & the Demands of Transformation*, 31 MICH. J. INT'L L. 765, 767 (2010); see also NIGEL WORDEN, *THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, APARTHEID, DEMOCRACY* 6-37 (3d ed. 2000) (discussing the history of land dispossession in South Africa).

27. *Id.* See also Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 849 & n. 87 (2009) (discussing how opposing views of property ownership can be detrimental to future political progress in post-colonial societies).

28. See e.g., Chang, *supra* note 13.

29. See Durkje Gilfillan, *Poverty Alleviation, Economic Advancement and the need for Tenure Reform in Rural Areas*, 1-2, Address at the SAPRN Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria (June 4, 2001), available at <http://www.sarprn.org.za/EventPapers/Land/20010605Gilfillan.pdf>.

30. See *id.* at 1.

31. See *id.* at 2.

32. See Atuahene, *supra* note 27, at 779-83.

33. See *id.*

34. See *id.* at 784.

own land.³⁵ Blacks who were previous landowners became tenants, and the land ownership of tribal officials became uncertain.³⁶

In 1936, the Native Trust and Land Act dramatically increased segregation by officially designating certain areas of land as available only to whites.³⁷ Simultaneously, the Native Trust and Land Act impeded the sustainability of black communities by re-designating black homelands to remote rural areas with few natural resources.³⁸ The Group Areas Act of 1950 exacerbated these problems by limiting the access of black individuals to specific urban areas.³⁹ The practical effect of the Group Areas Act was to prevent blacks from living or working in cities and urban areas in South Africa.⁴⁰ Blacks were restricted to various "homelands," rural locations without white South Africans, which were established throughout the country.⁴¹

At the height of these regulations came the Prevention of Illegal Squatters Act of 1951, which forced the relocation of blacks who were squatting on white public or private property.⁴² The Illegal Squatters Act also applied to black individuals who were renting land on white property, even allowing white property owners to demolish the renters' homes.⁴³ These black renters were then required to move into squatter villages.⁴⁴ Lastly, legislators passed Section 10 of the Native Laws Amendment Act of 1952 to limit the movement of blacks into urban areas.⁴⁵ Section 10 codified restrictive pre-apartheid practices by limiting the number of blacks allowed to live in urban areas only to those who were one of the following: (1) born in an urban area, (2) employed in an urban area for over 15 years, or (3)

35. See e.g., T.R.H. DAVENPORT & CHRISTOPHER SAUNDERS, *SOUTH AFRICA: A MODERN HISTORY* 271, 390 (2000). See also ROBERT C. COTTRELL, *SOUTH AFRICA: A STATE OF APARTHEID (ARBITRARY BORDERS)* 83 (2005) (noting that blacks made up over 70% of the population but lived on only 7% of the land).

36. See ANTON D. LOWENBERG & WILLIAM H. KAEMPFER, *THE ORIGINS AND DEMISE OF SOUTH AFRICAN APARTHEID: A PUBLIC CHOICE ANALYSIS* 34 (1998); see also BERTUS DE VILLIERS, *LAND REFORM: ISSUES AND CHALLENGES: A COMPARATIVE OVERVIEW OF EXPERIENCES IN ZIMBABWE, NAMIBIA, SOUTH AFRICA AND AUSTRALIA* 46 (2003); Gilfillan, *supra* note 29, at 2 ("Racial discrimination restricted the extent of land Blacks were allowed to own. . . . As a result chiefs and traditional authorities gained title in land to which they had no legitimate claim, neither at common law nor at customary law").

37. See e.g., Chang, *supra* note 13, at 627 (explaining the development of "homelands").

38. *Id.*

39. *Id.* See also Thami Ka Plaatjie, *Taking Matters Into Their Own Hands: The Indigenous African Response to the Land Crisis in South Africa*, in *UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA* 287, 291-92 (Margaret C. Lee & Karen Colvard eds., 2003).

40. The Group Areas Act deprived blacks of adequate opportunities for housing and forced many to commute long distances for work. See Helen Suzman, *Key Legislation in the Formation of Apartheid* (March 16, 2009) available at <http://www.cortland.edu/cgis/suzman/apartheid.html>.

41. *Id.*

42. Chang, *supra* note 13, at 629.

43. See DAVENPORT & SAUNDERS, *supra* note 35, at 390.

44. See *id.*

45. See Chang, *supra* note 13, at 629; see also DAVENPORT & SAUNDERS, *supra* note 35, at 390.

employed by the same urban employer for at least 10 years.⁴⁶ The Native Laws Amendment Act severely restricted the ability of black South Africans to find employment.

Today, approximately 32% of South Africans still live in the homelands.⁴⁷ In addition to living in re-designated homelands, problems with land invasion, squatting, urbanization, and severe black unemployment can also be traced back to these apartheid-era statutes.⁴⁸

2. South Africa's Democratic Constitution

In the early 1990s, South Africa faced pressure from the United Nations to end apartheid.⁴⁹ An international, multi-racial movement began toward a united South Africa. The first legislative progress was the Abolition of Racially Based Land Measures Act of 1991, which repealed the 1913 and 1936 Land Acts, thus reinstating in Blacks the right to own land.⁵⁰ In 1994, Nelson Mandela became President of the new democracy and the South African Interim Constitution was drafted and put into effect.⁵¹ Scholars have since characterized South Africa's Constitution as "the most admirable constitution in the history of the world."⁵²

The Constitutional framework was designed to reinstate the fundamental rights of black South Africans.⁵³ One of the most significant aspects of the new Constitution is the granting of property rights and housing rights to all citizens.⁵⁴ Specifically, Sections 25 and 26 of the Constitution create a right to adequate housing and declare that the government must use reasonable means to foster equitable access to land.⁵⁵ The statute's language, however, limits the government's responsibility to provide land and housing with the term "available resources."⁵⁶ This language provides South African citizens with a justiciable right without imposing expansive duties on the government.⁵⁷ This language also allows the legislature and government to work toward achieving these rights over an unde-

46. Chang, *supra* note 13, at 629.

47. *Id.*

48. See Chang, *supra* note 13, at 629 (citing *Republic of South Africa v. Grootboom* (2001) (1) SA 46 (CC) at 54 (S. Afr.)).

49. See Plaatjie, *supra* note 39, at 291-92.

50. See Villiers, *supra* note 36, at 47.

51. S. AFR. (INTERIM) CONST. 1993.

52. See Chang, *supra* note 13, at 621. South Africa finalized its current constitution in 1996.

53. See generally S. AFR. (INTERIM) CONST. 1993 (including provisions designed to protect formal democratic equality, as well as substantive rights that would ensure equal freedoms among the people of South Africa).

54. See S. AFR. CONST. 1996, §§ 25-27 (explaining South Africa's approach to human rights in the shadow of an apartheid government).

55. S. AFR. CONST. 1996, §§ 25-26; see also Chang, *supra* note 13, at 623.

56. See S. Afr. Const. 1996, §26(2) (determining that South Africa would be able to achieve progressive realization by taking reasonable measures within its available resources); see also Paul Nolette, *Lessons Learned from the South African Constitutional Court: Towards a Third Way of Judicial Enforcement of Socio-Economic Rights*, 12 MICH. ST. J. INT'L L. 91, 99-100 (2003).

57. See Chang, *supra* note 13, at 661 (citing S. AFR. CONST. 1996, §25).

fined period of time, while still granting the rights that allow South African citizens to legally challenge abuses.⁵⁸

B. *Government of the Republic of South Africa v. Grootboom*

South Africa's Constitutional Court addressed the scope of the government's responsibility to ensure constitutional rights and to provide housing in *Republic of South Africa v. Grootboom*.⁵⁹ In a class action suit, the government charged Irene Grootboom and 900 other citizens ("Respondents") with illegally occupying private government land.⁶⁰ The Respondents had relocated there from another squatter settlement, which lacked water, sewage, and electricity.⁶¹ Some of the Respondents had been on housing wait lists for over seven years.⁶² Upon moving to the government property, the group built shelters and called the new settlement "New Rust."⁶³ Within a few months, the municipality evicted the squatters and bulldozed their homes.⁶⁴ The Respondents then found refuge at a sports complex, where they built makeshift shelters but were still exposed to the elements.⁶⁵

While determining that the municipality did not take adequate measures to provide the Respondents with access to housing, the Constitutional Court established a reasonableness standard for assessing government-housing responsibilities.⁶⁶ Under that standard, the State is obliged "to take reasonable legislative and other measures to ensure the progressive realization of this right within its available resources."⁶⁷ Using the standard, the Constitutional Court concluded that although there was a "massive shortage in available housing and an extremely constrained budget[,]," the State failed to provide adequate housing and was prevented from using that failure as an excuse to eliminate shelters which were actively being used.⁶⁸ Even considering the financial constraints on the municipality, the Court found that the State action in *Grootboom* failed the reasonableness test.⁶⁹

The Constitutional Court required that the reasonableness test be universally applicable and respond to an array of housing needs.⁷⁰ This

58. Chang, *supra* note 13, at 661.

59. See *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 53 (S. Afr.).

60. *Id.* at 53. The other respondents consisted of 510 children and 390 adults. Furthermore, the land illegally occupied was ironically earmarked for low-income housing.

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.* at 55.

65. See *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 9-10 (S. Afr.).

66. See *id.* at 11.

67. *Id.*

68. *Id.* This avoided hindering government action with burdensome housing funding requirements.

69. See *id.* at 25-26.

70. See *id.* at 68.

meant a government program could not preclude segments of the population, and the program must respond to the short-term, intermediate, and long-term housing needs of the populations at issue.⁷¹ In *Grootbloom*, the municipality at issue was making an effort to construct long-term housing but its actions were found unconstitutional because the program violated the respondents' short-term housing needs.⁷²

The Court rejected the government's argument that requiring a balance of needs would result in the diversion of resources ordinarily used for long-term housing to short-term housing, which would make constructing housing developments impossible.⁷³ The Court also rejected the argument that if the government could not remove squatters, the government would lose the ability to develop designated properties, and the Court reiterated the State's duty to provide shelter.⁷⁴ The Court limited the government's responsibility to provide shelter, to constraining government action that destroys housing for which there is an immediate need.⁷⁵

In the context of land reform, the *Grootbloom* decision means that the government has a responsibility to strive to meet the rights threshold set by the Constitution. Although this requirement does not burden the government with providing more housing than is needed, the government is prevented from making decisions that will neglect immediate housing needs in favor of a long-term strategy.

C. *President of South Africa v. Modderklip Boerdery, Ltd.*

Implementation of the Constitution faces further issues because not all of the rights guaranteed under the Constitution comport with the ideals of all South Africans.⁷⁶ White South Africans have argued that many of the individual liberties guaranteed by the Constitution have been implemented

71. See *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 68 (S. Afr.).

72. See *id.* at 53.

73. See *id.* at 36-37 (emphasizing the balance between goals and means). Government measures must be effective and timely, but the availability of resources is an important consideration.

74. See *id.*; see also Marie Huchzermeyer, *Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell*, 14 URB. F. 80, 87-88 (2003).

75. See Marius Olivier, *Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences*, 33 VICT. UNIV. OF WELLINGTON L. REV. 117, 137 (2003) ("In *Grootboom* the Constitutional Court remarked, within the context of the right to access to adequate housing, that there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing"). This limitation curtails the government's obligation to provide housing, but it also lessens the constitutional rights. For example, *Grootboom* was handed down October 4, 2000 and the municipality did not create new housing plans until 2002. Eventually *Grootboom* had to find housing elsewhere.

76. Section Nine of the South African Constitution states that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." This clause has caused racial strife between South Africans who support the government's use of affirmative action to remedy past violations, and those who do not.

purely for the benefit of the black population, at the expense of the white South Africans.⁷⁷ This tension is best exemplified at the state level, where adequate financial commitment to provide services is often lacking.⁷⁸

Modderklip demonstrates the difficulties of forcing municipalities to obey court orders, regardless of the Constitution.⁷⁹ In *Modderklip*, a municipality evicted 400 homeless black individuals from an informal settlement.⁸⁰ That group then illegally occupied land held by Modderklip Boerdery, Ltd.⁸¹ The municipality notified Modderklip of the illegal occupation and ordered the company to evict the squatters.⁸² Modderklip refused to evict the squatters because it believed the eviction was the city's responsibility.⁸³ Instead, Modderklip brought trespass charges against the squatters; however, the police requested the company refrain from filing criminal charges due to inadequate prison capacity.⁸⁴ Modderklip then offered to sell the property to the city for 10,000 rand, but the city rejected the offer.⁸⁵ As a result of the delay, 18,000 squatters occupied the property in October 2000, growing to almost 40,000 by April 2001.⁸⁶

The Constitutional Court held for Modderklip and affirmed damages for both the lost use of the property and the state's gain in avoiding the need to provide the squatters alternative land.⁸⁷ Importantly, the Court acknowledged that damages were not an optimal form of relief.⁸⁸ The Court explained that the State should have expropriated the property for the squatter's use, especially since Modderklip offered to sell the property.⁸⁹ This would have allowed the inhabitation to be legal, and the State would have avoided the problem of having to find a substitute property for the squatters.⁹⁰ The Court, however, acknowledged its inability to force expropriation without violating the separation of powers.⁹¹

In *Modderklip*, the need for the judicial branch to avoid determining how the State would meet its constitutional responsibilities outweighed

S. Afr. Const. 1996, §9. See also *supra* note 11 (commenting on the racial divide in opinions regarding land restitution policies).

77. See Atuahene, *supra* note 4 (referring to the affirmative action provisions in the constitution, which were designed to benefit black South Africans in order to remedy the effects of the apartheid regime).

78. See Chang, *supra* note 13, at 622-23.

79. See *President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 9 (S. Afr.).

80. *Id.* at 3-4.

81. See *id.*

82. See *id.* at 4-5. This order complied with § 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

83. See *id.* at 5-6.

84. See *id.* at 4.

85. See *President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 10-11 (S. Afr.).

86. See *id.* at 5-6.

87. See *id.*

88. See *id.* at 13-14.

89. See *id.* at 28-29.

90. See *President of S. Afr. v. Modderklip Boerdery, Ltd.* 2005 (5) SA 3 (CC) at 28-29 (S. Afr.).

91. See *id.* at 33-35.

efficient distribution.⁹² The Court also discussed the State's responsibility in ensuring the maintenance of law and order.⁹³ While the municipalities at issue in this situation failed to purchase the land for the squatters, the Court cautioned against making the same decision in the future. Without State enforcement of individual rights, citizens could be pushed into taking the law into their own hands.⁹⁴ Local governments must thus implement socio-economic rights and land reform programs in order to avoid a Zimbabwe-like situation.⁹⁵

II. South Africa's Land Reform Policies

Many politicians and activists call for land reform as the mechanism to rectify the inequality still prevalent in South Africa.⁹⁶ Implicit in popular land reform is a push to redistribute land predominantly owned by white farmers in a manner that would facilitate the creation of a large, black farming class.⁹⁷ Many argue that South Africa's long-term economic security depends on both continuous agricultural development and sustainable economic activity for the native populations.⁹⁸ The reality today, however, is that most South Africans live or are migrating to urban areas of the country.⁹⁹ This creates a more pressing need for urban employment and housing opportunities, as opposed to plots of land to farm.¹⁰⁰ While the government struggles with securing sufficient funds to finance both the redistribution of land and development of urban infrastructure for migration,¹⁰¹ the country continues to face massive problems of homelessness, landlessness, and inadequate resources for the poorest South Africans.¹⁰²

92. See *id.* at 28-30.

93. See *id.* at 9-11.

94. See *id.* at 26.

95. See *id.* ("Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it").

96. See e.g., Atuahene, *supra* note 4 ("According to South African President Jacob Zuma, land reform ranks at the top of the ANC's agenda").

97. See *Policy in the Making*, *supra* note 9, at 10.

98. See *Land and Power: The growing scandal surrounding the new wave of investments in land*, RELIEF WEB (Sept. 22, 2011) available at <http://reliefweb.int/report/world/land-and-power-growing-scandal-surrounding-new-wave-investments-land>. The World Bank has recognized the importance of land tenure in the context of Africa's agricultural development.

99. See *Policy in the Making*, *supra* note 9, at 10.

100. See e.g., *Land Reform in South Africa: Getting back on track*, CENTRE FOR DEVELOPMENT AND ENTERPRISE, RESEARCH NO 16, Executive Summary 3 (May 2008) available at www.urbanlandmark.org.za/downloads/LandReform_South_Africa.pdf [hereinafter CDE] (explaining South Africa's urbanization and "land reform programmes must include the identification and release of urban and peri-urban land for settlement, housing and job creation, as well as reform of ownership and use of land suitable for farming").

101. See Atuahene, *supra* note 4 (noting that South Africa's Land Restitution Commission, the agency responsible for the land reform efforts, placed a moratorium on land restitution in 2010. This was a result of underfunding from the government, which caused the agency to back out of numerous land-purchase agreements).

102. See Chang, *supra* note 13, at 667 (concluding that the transfer of land has the potential to "raise the standard of living for much of the population" but the government

Hence, land redistribution efforts, which are dependent on adequate funding, have stagnated.¹⁰³

Land reform is critical to South Africa's stability, economic development, and recovery post-apartheid.¹⁰⁴ In 1994, the government established a land reform program geared toward accomplishing these goals by implementing the Constitution's open-ended property clause.¹⁰⁵ Three different program components address post-apartheid land inequities—land restitution, land tenure reform, and land redistribution. Land restitution restores land to blacks whose property was taken under apartheid legislation.¹⁰⁶ Land tenure reform conveys ownership rights to blacks, who have worked and lived on farms for years without secured rights.¹⁰⁷ Land redistribution involves tailoring policy to create more black landowners.¹⁰⁸

A. Land Restitution

Since the Native Land Act of 1913, black South Africans have been deprived of legitimate land ownership in a variety of ways.¹⁰⁹ Under the land restitution initiative, blacks are given back the property that was taken away from them under apartheid legislation, with the goal of righting previous wrongs and promoting equality and land ownership between the races.¹¹⁰ Restitution applies to both rural and urban land claims.¹¹¹ The Restitution Act created a committee to investigate land claims and a court to settle claims between parties.¹¹²

Restitution has by far been the most successful of the three reform methods.¹¹³ In 2006, the Land Claims Commission declared that 89% of

still needs to focus on "urbanization, public transportation, and high unemployment rates").

103. See e.g., Amy Ochoa Carson, *East Timor's Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 *IND. INT'L & COMP. L. REV.* 395, 414 (2007) (explaining South Africa's "The land tenure program did not prove to be as successful as the government had hoped; a mere forty-one out of 63,000 claims were settled [by 2005]").

104. See Atuahene, *supra* note 4 ("South Africa's failure to rectify its land inequality is like a sea of oil waiting for a match").

105. See S. AFR. CONST. 1996, §§ 25, 26 (granting all individuals the right to own property); see e.g., Hasani Claxton, *Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa*, 8 *MICH. J. RACE & L.* 529, 546 (2003) ("The South African Department of Land Affairs (DLA), headed by Derek Hanekon, was created in 1994 to deal with land distribution issues").

106. See Claxton, *supra* note 108, at 546.

107. See *id.*

108. See *id.* at 547.

109. See Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 *SMU L. REV.* 1419, 1457 (2007) (noting that dispossession of black land began before 1913 however "the 1913 law was the first major piece of legislation that allowed the newly formed South African state to legally dispossess Blacks of their land").

110. See *id.* The land restitution initiative was implemented in 1994 with the Restitution of Land Rights Act, no. 22.

111. See Chang, *supra* note 13, at 633.

112. See *id.*

113. See *id.*

the claims it received had been settled.¹¹⁴ Land restitution involves the adjudication of claims, with the party entitled to damages having the option of either land or monetary compensation.¹¹⁵ The South African government would acquire white-owned land based on market rates and then redistribute the land based on the Land Claim Court decisions.¹¹⁶ After determining the “willing buyer, willing seller” model was taking too long and proving to be ineffective,¹¹⁷ the government shortened the legal negotiation period to six months and reserved the right to expropriate the land if negotiations proved to be unsuccessful.¹¹⁸

Despite the program’s initial success and future potential, the program never fulfilled the goal it was set to accomplish. While 89% of claims were settled, those claims were settled via payouts as opposed to land. Blacks who would have preferred to receive land instead of monetary compensation were out of luck because white landowners were reluctant to actually sell their land.¹¹⁹ Alternatively, white landowners would selectively identify parcels to sell and then receive market rate for the worst sections of the land they owned.¹²⁰ In the context of a shortage of farmable land to distribute, urban land reform proved dramatically more successful.¹²¹ The

114. See *id.*; see also See KwaZulu-Natal, *Land claims settlements near 90%*, says Gwanya Edward West, BUS. DAY (July 5, 2006, 2:00) available at <http://www.eprop.co.za/commercial-property-news/item/7119-Land-claims-settlements-near-90-says-Gwanya-Edward-West.html> (“The Land Claims Commission says it has settled 89% of the claims lodged with it, while the remaining 11% are expected to be completed by 2008”).

115. Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, 264 (2003) (Margaret C. Lee & Karen Colvard eds., 2003).

116. See *id.*

117. See Review on Land Acquisition and Willing Buyer Willing Seller Principle: brief- ing by Department of Rural Development and Land Reform; Committee Report on joint oversight visits to the Northern Cape, Limpopo, Free State and Mpumalanga (May 23, 2012) available at <http://www.pmg.org.za/print/report/20120523-department-rural-development-and-land-reform-findings-study-commissio> (quoting Mr. S. Ntapani, a leader of the United Democratic Movement (the ANC’s opposition party), stating that “[t]he pace of land redistribution was slow and ineffective. The figure quoted in the report for redistributed land already allocated was too little, why? The Department had been using the willing-buyer willing-seller approach, it had to be agreed that this was not working. Nation building and social cohesion could not be a talking point when the majority of the people in this country were landless. There was a need for commitment and flexibility from all the stakeholders”).

118. See *Farmers spooked by ‘expropriation’ threat*, 6 WORLD TRADE REV. (Sept. 2006), available at <http://worldtradereview.com/news.asp?pType=N&iType=A&iID=139&siID=22&nID=29192> (“Organizations representing farmers called on Agriculture and Land Affairs Minister Lulu Xingwana to clarify remarks that farmers had six months to agree on a selling price before their farms would be seized”); see also Justin Arenstein & Thandee N’wa Mhangwana, *Scam sparked land reform review*, BUANEWS (Mar. 3, 2006), available at http://www.lawlibrary.co.za/notice/wordsanddeeds/2006/2006_03_06.htm#press_scamparked (“Expropriation ‘will only be used very selectively in a very small number of cases where negotiations have effectively stalled without any prospect of resolution,’ said Dr Edward Lahiff, a researcher at the University of the Western Cape’s programme for land and agrarian studies.”).

119. See Hall, *supra* note 115, at 262.

120. See *id.*

121. See CDE, *supra* note 100, at 4 (noting that “[t]he restitution process has successfully settled almost all urban claims”).

increased success can be partly attributed to urban claimants being significantly more likely to consent to receiving monetary compensation, as opposed to actual land.¹²² Today, the vast majority of unsettled claims involve rural land, where an individual claim can cover hundreds of families and huge amounts of land.¹²³

B. Land Tenure Reform

The government designed land tenure reform to provide ownership possibilities for black farmers who had worked or had other historical claims to white-owned farmland.¹²⁴ Individuals seeking tenure had claims to the property based on years, sometimes going back generations, of working on commercial farms, or based on living and working on communal homelands (both of which created no formal ownership rights).¹²⁵

For individuals working on commercial farms, the Land Reform Act of 1996 and the Extension of Security of Tenure Act of 1997 created ownership interests in the farms where they worked.¹²⁶ The acts legally secured land tenure and “allowed second-generation labor tenants to acquire the titles to land they had used for cultivation and grazing in lieu of remuneration in cash.”¹²⁷ However, in reality, these programs were most effective for developing a formal process for labor tenants to bring legal land-related claims and demand formal eviction procedures.¹²⁸ When evictions occurred, the government provided alternative land or housing for those tenants.¹²⁹

For individuals inhabiting communal homelands, the Communal Property Association Act 28 of 1996 protected the collective right to land, which had not been acknowledged under the common law land system.¹³⁰

122. See Chang, *supra* note 13, at 633.

123. See Hall, *supra* note 115, at 262.

124. See Chang, *supra* note 13, at 634.

125. The hierarchy prioritizes ownership in this order: ownership itself, limited real rights that restrict rights of owners, and personal rights in property. See Chang, *supra* note 13, at 634. Farming commercial farms or communal homelands did not reach the personal rights in real property level of ownership. *Id.*

126. See Department of Rural Development & Land Reform of the Republic of South Africa, Strengthening the Relative Rights of People Working the Land: Policy Proposals (July 30, 2013) [hereinafter RDLR] available at www.plaas.org.za/. . . landpdf/Strengthening%20the%20Relative%20Right. These pieces of legislation were designed to protect the rights of commercial farmers. In 2004, an estimated six million black farmers were evicted or displaced from commercial farms in South Africa.

127. Hall, *supra* note 115, at 264.

128. See Gilfillan, *supra* note 29, at 7 (“In reality [] the legislation has provided for little else but a statutory framework for ‘fair eviction procedures’”); see also RDLR, *supra* note 125, at 17 (“The highly unequal relationship between farm owners and farm workers/dwellers, in which the latter are completely dependent on the former for sustaining livelihoods, makes it almost impossible for these vulnerable groups to fight for their rights”).

129. Hall, *supra* note 115, at 264.

130. *Id.* (“The white system under apartheid didn’t recognize communal land, because it was a form of customary law. However, the Communal Property Act created a formal framework that gave communal property rights to a legal entity called a Communal Property Association, which then registered the property”).

This right was strengthened by the 1996 Interim Protection of Informal Land Rights Act, which protected individuals with communal land interests (as opposed to the community).¹³¹ Under that system, individuals with communal land claims could not be deprived of their land rights without consent.¹³²

C. Land Redistribution

The goal of the land redistribution program was to provide black South Africans with access to agricultural land.¹³³ Redistribution was one of the initial goals of the land reform program because it was seen as being maximally able to promote socioeconomic justice and economic development for the black community.¹³⁴ Unlike the land tenure and land restitution programs, blacks benefiting from redistribution had no former claim to land and had to qualify for state grants to purchase land.¹³⁵ This program would help most in the long term by resolving land, housing, and poverty problems, as well as by creating equality.¹³⁶

Similar to what it did with land restitution, however, the government decided to adopt a “willing-buyer, willing-seller” approach, which allowed whites to inflate prices and slowed down the process because the State was the only purchaser.¹³⁷ In an attempt to fix this issue, the government announced a plan of expropriation of prices if price settlements became stagnant after six-months.¹³⁸ These complications have led to widespread disappointment at the slow pace of the redistribution process.¹³⁹ As of 2005, the government had transferred less than 4% of white-owned farmland back to black ownership.¹⁴⁰

South Africa’s current goal of increasing redistribution in rural lands is primarily to avoid a domestic uprising and land-grabbing situation com-

131. See Interim Protection of Informal Land Rights Act 31 of 1996 (S. Afr.), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/land/interim-protection-of-informal-land-rights-act-31-of-1996/act/31-of-1996-interim-protection-of-informal-land-rights-act-26-june-1996-27-september-1998-pdf/download>.

132. See *id.*

133. See RDLR, *supra* note 125, at 23.

134. See Chang, *supra* note 13, at 636.

135. See *id.*

136. See *id.* (describing other comparable initiatives to promote similar goals).

137. See DEPARTMENT OF LAND AFFAIRS, TOWARD THE FRAMEWORK FOR THE REVIEWING OF THE WILLING BUYER WILLING SELLER PRINCIPLE 15-17 (Sept. 17, 2006), available at http://www.caxtonmags.co.za/data/files/doc/file_f51f2d1898758ed8b68157174c3c1d80.DOC (commenting “it is clear that the prices of land in the open market have been escalating and continue to do so because Government cannot walk away from the negotiations”).

138. See *Fair price for land reform*, BRAND SOUTH AFRICA (Dec. 8, 2004), available at http://www.southafrica.info/doing_business/economy/fiscal_policies/landreform-policy.htm; see also *Farmers spooked by ‘expropriation’ threat*, *supra* note 118.

139. See e.g., Pierre De Vos, *Willing buyer, willing seller works False if you have a lifetime to wait*, CONSTITUTIONALLY SPEAKING (June 13, 2013), available at <http://constitutionallyspeaking.co.za/willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/>.

140. See Chang, *supra* note 13, at 637.

parable to that of Zimbabwe.¹⁴¹ However, this is a risky move for South Africa. South Africa has 43,000 black and white rural farmers, and if the country meets the goal of a 30% white-to-black redistribution, thousands of white commercial farmers will likely be out of business.¹⁴² In light of the situation in Zimbabwe, this could be catastrophic for both the white farmers and the country's agricultural industry.¹⁴³

D. Zimbabwe: Lessons Learned

The government's struggle to strike a balance between rectifying the effects of apartheid and maintaining the goodwill of South Africa's white population has resulted in a stagnant and overly complex reform effort.¹⁴⁴ Many South Africans fear that, in the absence of speedy, effective progress, the country will follow Zimbabwe's example of violent land reform.¹⁴⁵

In 2000, Zimbabwe implemented a "land reform program" to institute a government-sponsored land restitution program.¹⁴⁶ This land restitution program was designed to return white-owned farmland to poor, black Zimbabweans. President Robert Mugabe instituted the program in response to cultural tensions focused solely on Zimbabwe's absence of prior land reform or redistribution.¹⁴⁷ A privileged political class executed the program, which ended up becoming a violent fiasco when the politically elite and unskilled workers repossessed most of the commercial farms.¹⁴⁸ The result was a dramatic decline in the country's agricultural

141. See *id.*

142. See *Farmers spooked by 'expropriation' threat*, *supra* note 118.

143. Today, Zimbabwe is no longer able to produce sufficient food supplies to feed its country, much less to use farming as a profitable export. See generally Ward Anseeuw, Tinashe Kapuya & Davies Saruchera, *Zimbabwe's agricultural reconstruction: Present state, ongoing projects and prospects for reinvestment* 9 (Development Bank of Southern Africa, Working Paper Series No. 32, 2012).

144. Zimbabwe has a similar experience with colonialism to that of South Africa. Zimbabwe has a history of white rule, similar to the start of apartheid. Ian Smith, a white colonist, took over Zimbabwe in a brutal fashion that ensured his control, but also ensured gross resentment among the subjugated black communities. Black Zimbabweans who were not working on designated farms or in urban areas were forced to live on reserves. See Claxton, *supra* note 106, at 541.

145. See Anseeuw, Kapuya & Saruchera, *supra* note 143, at 9 (describing the Fast Track Land Reform Programme as "a process marked by considerable coercion, violence and illegal activity, [where] thousands of party-sponsored settlers and veterans of the Liberation War invaded commercial farms . . .").

146. See Ryan Dale Groves, *Fast-Track Land Reform and the Decline of Zimbabwe's Political and Economic Stability* 67-68 (2009) (unpublished M.A. Thesis, University of Central Florida in Orlando, Fl.), available at purl.fcla.edu/fcla/etd/CFE0002801. President Mugabe stated that he would adopt a "fast-track" land reform process in Zimbabwe where a national committee, the National Land Identification Committee, would identify tracks of land for redistribution. See also Simon Coldham, *The Land Acquisition Act, 1992 of Zimbabwe*, *JOURNAL OF AFRICAN LAW* 82 (Spring 1993), available at <http://www.jstor.org/stable/745590> (discussing the previous legislation which was supposed to speed up the land reform process through Land Designation and Compulsory Acquisition).

147. See Groves, *supra* note 146, at 67-68.

148. Some citizens of Zimbabwe fully supported Mugabe's efforts and have praised his intervention. See, e.g., Godfrey Marawanyika, *Thank you, Mr Mugabe: Zimbabwe's*

production, leading to food shortages and the destruction of numerous previously profitable commercial farms.¹⁴⁹

Zimbabwe then passed the Land Acquisition Act in 1992, which allowed the government (specifically President Mugabe) to create a Land Reform program that would facilitate the government's ability to redistribute and expropriate land.¹⁵⁰ Mugabe then tried to pass a referendum that would allow government expropriation without compensation, but the referendum failed.¹⁵¹ After his referendum failed, Mugabe permitted a group of war veterans to attack and overtake white farms.¹⁵² Today, Zimbabwe's Land Acquisition Act serves as the primary example of what not to do in land reform.¹⁵³ Furthermore, the act also demonstrates the inadequacy of a market-based land reform program in societies that require a massive restructuring of a country's land and wealth distribution.¹⁵⁴

III. South Africa's Mining Paradigm

South Africa is home to some of the richest mineral resources on the African continent.¹⁵⁵ However, apartheid policies led to the inequitable distribution of those resources.¹⁵⁶ Prior to 1992, the South African government promoted an individual land-ownership policy under the guise that "successive [South African] governments ha[d] 'since 1910 pursued economic policies based on the principles of free enterprise and the market system.'"¹⁵⁷ In reality, under apartheid only white South Africans had the rights to own land, which effectively limited access to the mineral market to less than 10% of the total population.¹⁵⁸ The country experienced a

forced land redistribution led to huge controversy - but it has transformed the lives of thousands of small farmers, THE INDEPENDENT (Nov. 5, 2013), available at <http://www.independent.co.uk/news/world/africa/thank-you-mr-mugabe-zimbabwes-forced-land-redistribution-led-to-huge-controversy-but-it-has-transformed-the-lives-of-thousands-of-small-farmers-8923229.html>.

149. See Groves, *supra* note 146, at 69 ("Damage caused to Zimbabwe's infrastructure and economy was incalculable. Underutilization of farms, unqualified personnel, mass unemployment, shortages of foreign currency, and severe food shortages compounded the international isolation, drought, and political upheaval that had defined the past five years").

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*

154. See Heather Boyle, *The Land Problem: What Does the Future Hold for South Africa's Land Reform Program?* 11 IND. INT'L & COMP. L. REV. 665, 687 (2001).

155. South Africa hosts the world's largest reserves of gold, platinum group metals, chrome and manganese ores, and the second-largest reserves of zirconium, vanadium, and titanium. *Pocket Guide to South Africa 2012/13: MINERAL RESOURCES*, available at <http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/pocketguide/2012/15%20Mineral%20Resources.pdf>.

156. See LARP, *supra* note 2, at 7.

157. *Laissez-Fair*, *supra* note 14, at 167 (quoting White Paper on the Mineral Policy of the Republic of South Africa: Para 1.8). On 1 January 1992, the 1991 Minerals Act came into effect and South Africa was regulated by a combination of common law and legislation. See *id.*

158. See DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16.

dramatic shift in 2004 when the Mineral and Petroleum Resources Development Act of 2002 came into effect and essentially nationalized the mining process.¹⁵⁹

A. History of South Africa's Mining Rights

Three common forms of mineral ownership exist in government-coordinated mining systems.¹⁶⁰ The first model is state ownership where the government holds property rights to all mineral resources "on behalf of the people[.]"¹⁶¹ The second method is the "lease or 'regalien' system" which most countries currently utilize.¹⁶² Under that system, the state holds all permanent mineral rights and miners both apply to and pay the state for tenured rights to mine specific minerals.¹⁶³ The third method grants the owner of the land surface corresponding rights "to hold, extract, or dispose of the [underlying] minerals."¹⁶⁴ Under that system, prospectors have the right to obtain private mineral rights by discovering minerals and registering a claim.¹⁶⁵

For the majority of the apartheid era, South African common law followed the third model, where landowners also owned any minerals that existed below the surface.¹⁶⁶ Mineral rights holders could exploit the minerals on the land in addition to assigning or transferring their mineral rights for value.¹⁶⁷ However, The Group Areas Act of 1950, which limited black access to urban areas, applied to all land ownership and effectively

159. See Peter Leon, *Creeping Expropriation of Mining Investments: an African Perspective*, 27 JERL 597, 2 (Nov. 2009). Subsequent legislation has continued to ensure mining regulation operates to facilitate the discovery and development of South Africa's mineral resources, while ensuring that the government conducts the investigation into future mineral resources in a sustainable and economically beneficial manner. Tumai Murombo, 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation' [hereinafter *Regulating Mining in South Africa*], 9/1 L. ENVIR. & DEV. J. 31, 43 (2013) available at <http://www.lead-journal.org/content/13031.pdf> (citing Mineral and Petroleum Resources Development Act 28 of 2002).

160. See Muna Ndulo, *Mining Legislation and Mineral Development in Zambia*, 19 CORNELL INT'L L.J. 1, 13-15 (1986).

161. *Id.* at 13 (citing Mines and Minerals Act, ch. 329 of the Laws of Zambia (as amended by No. 32 of 1976) Section 3(1) (Zambia is one of the countries following the State-ownership model, with its President holding the property right to all minerals within its boundaries).)

162. *Id.* at 14.

163. See *id.* "The miner's tenure is seldom equivalent to a fee title, but is rather a bundle of rights and obligations, the composition of which varies greatly from country to country."

164. *Id.*

165. See *id.* at 15.

166. See Laissez-Fair, *supra* note 14, at 16 ("This 'mineral right holding,' in terms of the various mining laws and common law, [gave] the landowner special rights either to mine or, where statutorily required, to obtain the necessary mining title" (citing Blen Lloyd Stuart Franklin & Morris Kaplan, *The Mining and Minerals Laws of South Africa* 7 (1982) and Mining Rights Act 20 of 1967 Section 7(2)(a), 25(2))).

167. Landowners could be the holders of the mineral rights, or, where rights were severed, an individual could hold title specifically to the mineral rights. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 26.

precluded blacks both from acquiring land or mineral rights.¹⁶⁸

In South Africa's apartheid-era mineral program, the government issued claims and mining leases to interested prospectors.¹⁶⁹ These prospectors were white individuals who had made mineral discoveries or could trace legitimate ownership.¹⁷⁰ The government granted mining leases for the excavation of deep-level mines to any applicant perceived as being able to promote the government's goals.¹⁷¹ Blacks were excluded from that opportunity by Section 7 of the Group Areas Act as well as Section 25(3) of the Mining Rights Act, which stated that "no lease shall be granted unless the Minister is satisfied that there are reasonable grounds for believing that precious metals occur in workable quantities."¹⁷² Since the Mining Rights Act prevented blacks from owning land and holding prospecting licenses, whites exclusively held these mining leases.¹⁷³ The effect of the mining laws was to effectively prevent non-whites from "acquiring and exploiting any significant mineral deposits of any nature in South Africa," and "has limited their participation in the mining industry to that of labourers."¹⁷⁴

The effects of the restrictive mining regime were very similar to the effects of the restrictive land ownership laws.¹⁷⁵ Under apartheid, the government forced blacks to accept the transfer of land and mineral rights to white prospectors.¹⁷⁶ However, once the demise of apartheid led to changes in the laws that lifted the restrictions, black South Africans supported the redistribution of those mineral rights and the accompanying wealth.¹⁷⁷ Empowered by the newly drafted constitution, lobbying move-

168. See *id.* at 25. While the government could grant an exception if there was a compelling reason to grant a black individual ownership rights, this occurrence was extremely rare. This legislation effectively precluded blacks from benefitting from South Africa's extensive mineral wealth.

169. See Badenhorst, P.J., *Exodus of 'mineral rights' from the South African Mineral Law*, 22 J. ENERGY & NAT. RESOURCES L. 218, 222 (2004).

170. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 38. "The Act provides that a claim license may be obtained by 'any natural person of the age of eighteen years or upwards . . . ' but goes on to state that no claim license shall be issued 'to a coloured person, except in respect of state land situated in the Province of Cape of Good Hope or land which the ownership vests in a coloured person or an association of coloured persons or a corporate body or company in which coloured persons hold a controlling interest; to a black, except in respect of land which the South African Development Trust or a black is the owner or which is held in trust for a black. Group Areas Act Section 49(2)(b) (1950).

171. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 38.

172. *Id.* at 11.

173. See *id.* at 70.

174. *Id.* at 3.

175. See Yazini April, *An Analysis of the Mineral and Petroleum Resources Development Act 28 of 2002, and the Nationalisation of Minerals Debate in South Africa*, 42 AFRICA INSIGHT 115, 117 (2012) ("The structure of mineral law in South Africa has always been complicated, and heavily influenced by the racial injustices of apartheid.").

176. See *id.* at 118 ("Many black-owned communities who lived on mineral-rich land did not even have the basic claim to minerals since they could not be owners of the land under apartheid, which can be evidenced through the Land Act 27 of 1913 and the Trust and Land Act 18 of 1936, which deprived blacks of land wealth").

177. See ANC POLICY INSTITUTE, *supra* note 17, at 115. See also Cohen, *supra* note 21.

ments emerged to ensure that a united South Africa would benefit from the country's mineral wealth.¹⁷⁸

B. South Africa's Current Mining System

Until 2004, holders of mineral rights had the right to use their minerals as they wished.¹⁷⁹ These rights included exploiting the minerals on their land and assigning or transferring the mineral rights for value under the Minerals Act of 1991.¹⁸⁰ Following the third model of mineral ownership (where landowners also owned any minerals that existed below the surface), the mineral rights were tangible rights of indefinite duration. These rights did not require the holder to exercise the rights via mining in order to maintain them.¹⁸¹ The government only got involved if the rights holders needed authorization to prospect or mine under the Minerals Act.¹⁸² Depending on the minerals in question, officials would issue the necessary authorization and then there was no further mechanism for government control.¹⁸³ Specifically, "common law rights to minerals were not subject to termination by a public authority for non-compliance with the Minerals Act or on any other grounds."¹⁸⁴

The mining system changed in 2002 when Parliament passed the Mineral and Petroleum Resources Development Act ("MPRDA").¹⁸⁵ The MPRDA effectively:

[Froze] the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterili[z]e mineral rights, otherwise known as the entitlement not to sell or exploit minerals.¹⁸⁶

Mineral rights holders were furious because the legislation removed their ability to sell, lease, cede, and prospect minerals, thus dramatically altering

178. See Frik Els, *Anglo-American lobbying flops as clamour intensifies for nationalization of South Africa's mines*, MINING.COM (June, 19, 2011), available at <http://www.mining.com/anglo-american-lobbying-flops-as-clamour-intensifies-for-nationalization-of-south-africas-mines/> (commenting on "growing calls in South Africa for majority government ownership of key industries and a push for a greater role for the state in the economy").

179. Holders of mineral rights could be either the owner of the surface (where the mineral rights had not been severed from the land) or a successor in title to the surface owner.

180. See *Trojan Exploration Co (Pty) Ltd v Rustenberg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509 and 528I-529B.

181. See *Ex parte Marchini* 1964 (1) SA 147 (T) at 150-51.

182. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 35 ("[T]he control by the state under [the Minerals Act] was a system whereby the exercise of mineral rights was controlled through permits, authorizations, licenses and permissions which created a framework within which common-law mineral rights as elements or derivatives of ownership of land, could be exercised").

183. See Minerals Act, §§ 9(3), 9(5), and 39.

184. Leon, *supra* note 159, at 11.

185. Mineral and Petroleum Resources Development Act 28 of 2002.

186. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 39.

the rights that they had previously held.¹⁸⁷ The government effectively removed the previous owners' abilities to use minerals or the rights without more explicit authorization. This restriction was designed to prevent the exploitation of minerals by eliminating an owner's mineral rights to determine the amount and pace of their mining.¹⁸⁸

While many of the mineral rights holders lobbied against this legislation and filed expropriation suits, the government stood its ground.¹⁸⁹ The government defended this change because the MPRDA gives effect to Section 25(4)(a) of the South African Constitution.¹⁹⁰ Section 25 "requires that reform measures be implemented to bring about equitable access to all South Africa's natural resources."¹⁹¹ The democratic South African government introduced this mineral rights policy in order to enable equitable, race-blind access to South Africa's mineral wealth by implementing "a system of state custodianship of mineral resources 'for the benefit of all.'"¹⁹² Under the Mineral and Petroleum Resources Development Act 28 of 2002, Section 3(2) states that:

"As the custodian of the nation's mineral and petroleum resources, the state, acting through the Minister, may -

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.¹⁹³

The implementation of the MPRDA changed the mechanism of resource ownership and created a one-year term for exchanging mineral rights, at the end of which any remaining "old order rights" would expire.¹⁹⁴ With the State as custodian, mineral resource owners were deprived of the basic right of control that they previously enjoyed.¹⁹⁵ Legal critics have complained that "[t]he Act essentially replaced the principles of private law, based on rights of ownership, with principles of administrative law based on conditional state licenses."¹⁹⁶ Regardless of the conflicting views, the implementation of the MPRDA has correlated with diminishing

187. See *id.* at 50.

188. See *id.* at 50.

189. See April, *supra* 178, at 119 ("The Act essentially replaced the principles of private law, based on rights of ownership with principles of administrative law based on conditional state licenses. In this regard, the MPRDA provided the initial impetus for the encroachment on the ownership rights of mining investors.")

190. See S. AFR. CONST., § 25(4)(a) of 1996.

191. Leon, *supra* note 159, at 12.

192. See DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16, at para. 1.3.1.2.

193. *Id.*

194. Mineral and Petroleum Resources Development Act 28 of 2002, 94-95.

195. See Peter Leon, *A Fork in the Investor-State Road: South Africa's New Mineral Regulatory Regime Four Years On*, 42(4) J. OF WORLD TRADE 671, 679 (2008).

196. Leon, *supra* note 159, at 12.

values of mineral rights in South Africa.¹⁹⁷

Despite the depreciation in the value of mineral rights, the MPRDA serves a valuable function.¹⁹⁸ Today the government monitors all mineral claims.¹⁹⁹ Private companies and individuals still have the ability to mine resources, but the government taxes companies separately for prospecting, mining, and removing minerals from the land.²⁰⁰ This multiple taxation system accomplished many objectives.²⁰¹ First, the taxes significantly increased the government's profit from domestic mining operations.²⁰² Second, the government was able to intentionally regulate mineral extraction and mining across the country.²⁰³ Third, this regulation enabled the government to preserve mineral deposits and prevent mining monopolies.²⁰⁴

IV. Implementing a Mining Framework on Land Ownership

A. The Rationale

Apartheid created tensions in South Africa's mining industry that were similar to the tensions that the farming industries currently face.²⁰⁵ Until the 1990s, whites held almost complete title to the country's mineral and mining rights with nearly no restrictions on the way those rights could be exercised.²⁰⁶ The development of South Africa since apartheid has led to industry-wide reforms that have partially nationalized the mining industry and enabled the government to implement a system that meets the goals of efficiency, mineral conservation, and equal access to mineral

197. See *id.*

198. See April, *supra* 175, at 125 ("According to the South African parliament report, key activities of this regulation programme would include monitoring and enforcing compliance, inspections of social and labour plans, mining and prospecting work programmes, and environmental management plans").

199. See *id.* at 120.

200. See Leon, *supra* note 159, at 12, 23.

201. See Elmarie van der Schyff, *South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals*, 64 *NEW CONTREE* 131, 131 (July 2012) ("In 2009 mining contributed 8.8% directly and 10% indirectly to the country's gross domestic product (GDP), sustained approximately one million jobs and created roughly R10.5 billion in corporate tax receipts").

202. See generally Graham Glenday, *South African Tax Performance: Some Perspectives and International Comparisons*, Tax Symposium 2008, National Treasury of South Africa (Mar. 26, 2008), available at <https://fds.duke.edu/db/attachment/826>.

203. See generally Avril Cole, *Mine regulations changing in South Africa*, *THE INTERNATIONAL RESOURCE JOURNAL* (Jan. 11, 2014) available at http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

204. See DEPARTMENT OF MINERAL RESOURCES OF THE REPUBLIC OF SOUTH AFRICA, *MINERAL REGULATION (2011)* available at <http://www.dmr.gov.za/mineral-regulation.html> (describing a function of the Mineral Regulation Branch as "[a]ddress[ing] past legacies with regard to derelict and ownerless mines and enforce legislation regarding mine rehabilitation by means of regulated environmental management plans").

205. See Laissez-Fair, *supra* note 14, at 172.

206. See THE PRESIDENCY OF THE REPUBLIC OF SOUTH AFRICA, *TWENTY YEAR REVIEW: SOUTH AFRICA 1994 - 2014* 87 (2014), available at www.20yearsoffreedom.org.za/20YearReview.pdf.

resources.²⁰⁷

Today, South Africa's mining reforms serve as an example to other mining countries of what is possible.²⁰⁸ South Africa has the advantage of its constitution, its strong government, and its judicial infrastructure that allow it to enforce a decision.²⁰⁹ The country has been able to demonstrate the possibilities of success for a nationally regulated mining system.²¹⁰ This presents numerous possibilities for other countries struggling with foreign control over a majority of domestic natural resources.²¹¹ Given Africa's history of colonization, most countries suffer from foreign mineral ownership in some regard.²¹²

More importantly, South Africa's success in mineral reform is directly applicable to the government's struggle with land distribution.²¹³ Given the many interests involved in land reform—from critics interested in providing small farms to poor blacks to those interested in funding urban migration—the reality is that South Africa's poor black population has a plethora of pressing needs.²¹⁴ Any land reform policy geared solely toward increasing available rural land will run the risk of ignoring the issues that are truly important in the urban and most volatile areas of South Africa, Johannesburg and Cape Town.²¹⁵

B. The Framework

Similar to the apartheid government's land ownership regulations, mining regulations prior to the 1990s systematically excluded non-white South Africans from the opportunity to own or be involved in the country's mineral wealth except in the capacity of menial laborers.²¹⁶ Once the democratically elected government began implementing the new Constitution

207. See *id.* at 3.

208. See Franklyn Lisk, Hany Besada & Philip Martin, *Regulating Extraction in the Global South: Towards a Framework For Accountability* 30 (High Level Panel on the Post-2015 Development Agenda, Background Research Paper, May 2012) (“At the policy level, a coordinated and integrated global value chain approach to mineral resource development is necessary [for sustainable mineral reform]”).

209. See *supra* notes 5-7 (describing South Africa's rights-based constitution).

210. See Thomas Walde, *Mining Law Reform in South Africa*, 17(4) *MINERALS & ENERGY* 10, 17 (2002). There is great risk involved in South Africa's mining efforts, including “the risk that a well-functioning industry might be destroyed and go down the same path as many other African countries (except Botswana). There is also a benefit, namely that the South African mining industry will no longer be seen to symbolize economic apartheid, but will be an engine of prosperity for all South Africans.”

211. See *id.* at 11.

212. See generally Gareth Austin, *African Economic Development and Colonial Legacies*, THE GRADUATE INSTITUTE OF GENEVA INTERNATIONAL DEVELOPMENT POLICY (2010), available at <http://poldev.revues.org/78> (discussing how colonial rule and African actions during the colonial period affected the resources and institutional settings for subsequent economic development south of the Sahara).

213. The struggle and debate between entrenched mineral right holders are comparable to those of the farmers and white landowners who currently hold states as a result of the apartheid regime.

214. See *Laissez-Fair*, *supra* note 14, at 172.

215. See *id.*

216. See Leon, *supra* note 195, at 679.

in 1994, the government justly re-defined the mineral-ownership paradigm in order to expand access to South Africa's non-white majority.²¹⁷ This process did not involve taking property from the white owners and giving it to the black citizens.²¹⁸ Instead, the government nationalized the rights and created a taxation structure to facilitate services, which benefited the whole country and the communities impacted by mining.²¹⁹ Although the owners of old-order mining rights have brought suits based on expropriation, the country has benefited as a whole from the departure of its previous private-ownership model.²²⁰ Furthermore, the previous rights holders are not forbidden from mining and further capitalizing on their rights.²²¹ Rather, the nature of their ownership has changed.²²²

The South African government must take a similar course of action in the realm of land ownership. The country's three-tiered effort to remedy unequal land distribution experienced great success initially; however, that success has plateaued and is no longer addressing the needs of South African citizens.²²³ This is largely due to the fact that beliefs about the country's political history influence political conversations around land reform and complicate changes that would further the country's economic and political well-being.²²⁴ Furthermore, the romanticized image of impoverished South Africans receiving farms and rural land as a method of extricating themselves from poverty should not be the government's primary concern.²²⁵ In reality, there are a much more pressing issues towards which South Africa should concentrate its resources, namely creating employment and housing opportunities for black South Africans in urban areas.

217. See Leon, *supra* note 195, at 679.

218. See Gavin Capps, *A bourgeois reform with social justice? The contradictions of the Minerals Development Bill and black economic empowerment in the South African platinum mining industry*, REVIEW OF AFRICAN POLITICAL ECONOMY 315, 316 (2012). Statements of the ANC leadership made it clear that expropriation of the mines was "off the political agenda . . . Rather, the state's influence within the mining industry would be 'confined to orderly regulation and the encouragement of equal opportunities for all citizens in mineral development'").

219. See DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16, at para. 1.3.1.2; see also Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.

220. See DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16, at para. 1.3.1.2; see also Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.

221. See Capps, *supra* note 218, at 316. While "older order" rights were abolished in favor of new "universal rights," it would be expected that mining companies would continue mining operations. The purpose of the act was to disseminate those rights in a manner that was centralized, eliminating entrenchment in the mining industry. This was designed to open the door to black miners.

222. See *id.*

223. See Atuahene, *supra* note 4.

224. See *id.*

225. See Keith Bryer, *Most land claimants do not want to be farmers*, BUSINESS REPORT (Aug. 20, 2014, 8:00 A.M.), available at http://www.iol.co.za/business/opinion/columnists/most-land-claimants-do-not-want-to-be-farmers-1.1737902#.VF5Sb_mAGGQ ("Today, most South Africans live in cities. Most of us, black and white, do not wish to farm. Above all, none of us relish the harsh life that 'peasant farming' inflicts").

Under a land-taxation regime (which mirrors South Africa's mineral-taxation regime), the South African government would implement a progressive taxation program. This program would impact all landowners, regardless of race, wealth, or socioeconomic background. The taxation scheme would depend on land size and land use. Certain types of land use—commercial farmlands, tribal farmlands, grazing land, barren land, etc.—would merit different initial tax brackets. Depending on the bracket, there would be a threshold hectareage²²⁶ under which land would not be taxed.²²⁷ Any land above that amount would be taxed annually based on quantity of surface area owned.

Suppose a landowner has 50 hectares and they surpass the initial tax bracket threshold. If there is a 1.75% land tax for parcels less than 50 hectares but a 5% land tax for parcels between 50 and 100 hectares, the land owner would then be taxed at 5%. The government would set the specific tax brackets according to the type of land ownership the government is interested in promoting. For example, 100 hectares might be the most profitable size for a profitable commercial farm, whereas 25 hectares might be the most efficient size for a private grazing parcel. The land owner would then have the option to adjust their ownership to minimize their tax burden, or, alternatively, they would be able to maintain their current ownership but pay taxes in a way that adds to the operational efficiency of the country.

This system will allow current landowners a finite period of time (ideally the one-year time frame allocated for mineral rights) during which they could register the titles and use of their land. The government could then continue adjusting the various importance levels of different land uses and apply taxes accordingly. For example, tribal lands or land being utilized by rural villages could be exempt from any taxation. Low-income farms might also be exempt or put into a very low tax bracket. On the other hand, commercial farms and game reserves could be put into graduated tax systems depending on the size of the area and on the services for which the land is being utilized. The country would be able to provide additional resources and put more funds into purchasing land for land restitution programs if the government implemented a registration scheme similar to the model used for land rights.²²⁸ If any type of land use became more important to the country, the taxation scheme could be adjusted.²²⁹

C. The Benefits

The effect of this tax scheme will be to tailor land use to the government's needs. The country will be able to provide additional resources and

226. Land in South Africa is measured according to hectares, as opposed to acres.

227. For example, land would not be taxed if the minimum hectareage for commercial farming were ten hectares.

228. See Atuahene, *supra* note 4 (commenting that South Africa's Land Restitution Commission lacked adequate funding to complete its land distribution goals).

229. This mirrors South Africa's ability to adjust its mineral taxation depending on which mines are more lucrative and in higher demand.

put more funds into purchasing land for land restitution programs.²³⁰ Additionally, implementing a registration scheme that is similar to the model used for mineral rights will allow citizens and the government to track land reform progress more closely.²³¹ At the same time, white landowners who hold tens of thousands of hectares of land, could choose to keep that land at a burdensome tax rate to maintain the registration on their lands. This will meet multiple government objectives.

First, this taxation system will allow the government to obtain land needed for the restitution program. A scheme that was incrementally increased should incentivize landowners to choose to own a specific amount of land right below one of the tax thresholds. Any forfeited land could then be used to settle more of the land claims that are still in flux.

Second, this taxation system will provide the government with an influx of income. Land is a unique commodity that owners tend to be reluctant to sell, even when it makes financial sense. For that reason, even a burdensome tax scheme will be unlikely to impact all landowners in the same manner. The funds paid from the tax could be used toward pressing urban concerns, the creation of more housing developments, or the provision of government job opportunities and public services. The funds could then be used to purchase land to further help with the restitution and tenure prongs of the current land program.

Third, a graduated tax rate will affect all landowners and will therefore be deemed race neutral. Although the majority of South Africa's land and mineral rights are currently held by white South Africans due to the Native Land Act of 1913, the 1936 Native Trust and Land Act, and the Group Areas Act of 1950, today there is a possibility of emerging black landownership.²³² Under this proposed land taxation scheme all substantial farms will be equally impacted, providing the South African government with greater legitimacy and increasing the likelihood of black land ownership.

Conclusion

Today, South Africa is a thriving democratic nation with the potential to be a model of a successful transition from colonized country to independent democracy. In order for the country to meet those goals, the government must continue to address the material racial inequalities that still plague South Africa. This requires South Africa to develop a land distribu-

230. See Glenday, *supra* note 202, at 6 ("South Africa charges a number of taxes on property— estate duty and donations tax, transfer duty and marketable securities tax— which in combination collect about 0.6% of GDP or just over 2% of revenues"). Adding a graduated taxation scheme to the existing taxation scheme would ensure increased revenues.

231. See generally SOUTHERN AFRICAN INSTITUTE OF MINING AND METALLURGY, *THE RISE OF RESOURCE NATIONALISM: A RESURGENCE OF STATE CONTROL IN AN ERA OF FREE MARKETS OR THE LEGITIMATE SEARCH FOR A NEW EQUILIBRIUM?* (2012). Given South Africa's relatively low sovereign debt and credible fiscal and monetary track record, increased nationalization will lead to a shift in company investment, monitoring, and the speed and intensity of government feedback on corporate behavior.

232. See *supra* Part 1.A.1.

tion system that continues the progress that the country has been able to make in rectifying the land grabbing that occurred under the apartheid regime. This proposed land taxation system should provide South Africans from the homesteads with the ability to migrate to urban areas. The alternative is to risk a potential internal conflict similar to what occurred in Zimbabwe.

In order to achieve the successful transition from a colonial land ownership model to a system that provides the possibility of land ownership to black South Africans, the South African government should follow the successful model set by its mining industry. The industry was able to avoid racial tension and drama stemming from South Africa's history by creating a mineral reform system that avoided racial distinctions.²³³

Implementing the mining industry model would allow the government to take an active role in land management, while incentivizing current land owners to either own smaller plots or choose to pay an increased tax burden depending on their land use. These changes would strengthen South Africa's long-term economic security by giving the government greater land and tax resources. Furthermore, this course of action would provide the government with the resources necessary to increase efforts to provide housing and jobs for urban migration—the real needs of South Africa's poorest populations.

233. See DEPARTMENT OF MINERALS AND ENERGY, *supra* note 16, at para. 1.3.1.2; see also Mineral and Petroleum Resources Development Act 28 of 2002, Section 3.